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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JENS ERIK SORENSEN, as Trustee of SORENSEN RESEARCH AND DEVELOPMENT TRUST, Plaintiff v. RYOBI TECHNOLOGIES, INC., a Delaware corporation; TECHTRONIC INDUSTRIES NORTH AMERICA, INC., a Delaware corporation; and DOES 1 – 100, Defendants.	Case No. 3:08 CV 0070 BTM CAB **PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR EXCEPTION TO STAY TO PRESERVE EVIDENCE** Date: August 8, 2008 Time: 11:00 a.m. Courtroom 15 – 5th Floor The Hon. Barry T. Moskowitz ***Oral Argument Has Been Respectfully Requested by Plaintiff***

Plaintiff, pursuant to a shortened procedure outlined by Judge Moskowitz in related cases,[1] hereby requests the Court for an exception to the stay entered in this case in order to preserve evidence that will otherwise be unavailable after the stay. Plaintiff has presented its arguments in brief form pursuant to the Court's request.

Plaintiff has already requested this exception and discovery by letters to Defendants' counsel, but Defendants have failed to agree. A list of all Accused Products (all Ryobi® brand tools) identified to date to the Defendants, whether in the Complaint or subsequent correspondence is attached hereto as Appendix B. Although Plaintiff failed to list them in their letters to Defendants' counsel, Accused Products in this case, according to the Complaint, also include Craftsmen® brand tools that are also listed in Appendix B.

The requested discovery is as follows:

1. Confirmation of preservation of all prototype and production molds used in the production of the Accused Products if they are within possession, custody, or control of named Defendants; and

2. Confirmation of preservation of all design and technical documents for the Accused Products that are in the possession, custody, or control of named Defendants.

For any of the above categories of evidence that are in the possession, custody, or control of non-parties (as Plaintiff understands some to be), Plaintiff requests as follows:

3. Sworn identification of the company name(s) and address(s) of all non-party manufacturers, suppliers, and importers for the Accused Products; and

4. Court leave to use appropriate procedural steps to acquire the

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[1] Sorensen v. Helen of Troy Texas Corporation, et al, Case No. 07cv02278 (see relevant portion of the transcript at Appendix A hereto); and Sorensen v. Black & Decker Corporation, Case No. 06cv1572 (see Docket # 264-277, various entries).

above-listed categories of evidence from, and/or conduct plant inspections of, non-parties.

Plaintiff believes these items of discovery are necessary and that delay until completion of the '184 patent reexamination creates the risk of loss of evidence.

Infringement notices and other communications regarding these products always end up in the same place – Defendant Techtronic Industries North America and its group of interrelated companies which include Defendant One World Technologies (defendant in the related *Sorensen v. Emerson Electric* case, 08cv00060). *Kramer Decl.* ¶ 7.

Upon information and belief, the Ryobi® and Craftsman® Accused Products are manufactured through the same channels as the Ridgid® products that are the subject of the *Sorensen v. Emerson* case. As to those products, Plaintiff has received contradictory information pre-litigation from the Defendants regarding where and how the Accused Products are manufactured, whether domestically or offshore by companies other than the named Defendants, and companies which may or may not even have common ownership to the Defendants. See the concurrently filed "Motion for Exception to Stay for Preservation of Evidence" filed in the *Emerson* case. *Kramer Decl.* ¶ 8.

Despite request to Defendants' joint counsel (joint also with the *Emerson* defendants and the defendant in the related *Sorensen v. Senco* case, Case No. 08cv00071), Plaintiff's requests have been met only with feigned inability to even understand Plaintiff's request for preservation of evidence (*Kramer Decl.*, ¶ 9, Exhibit A), there is no reason to believe that the prototype and production molds for the Accused Products, and related design and technical documents are being preserved by the named Defendants pending the stay of this case.

There is even less reason to believe that non-parties to this case are preserving evidence necessary to this case. "The obligation to preserve [evidence] arises when the party has notice that the evidence is relevant to litigation -- most commonly when the suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation." *Treppel v. Biovail Corp*., 233 F.R.D. 363, 371 (2006).

Unidentified, and thus non-party, manufacturers, suppliers, and importers, of the Accused Products may not have notice of this lawsuit and Plaintiff has no means of ensuring that they are preserving evidence for this case. Neither the Court nor Plaintiff can informally request evidence preservation, much less compel it, without this identification.

WHEREFORE, Plaintiff respectfully requests the Court to order an exception to the stay in this case for purpose of conducting the discovery outlined above.

DATED this Monday, June 09, 2008.

JENS ERIK SORENSEN, as Trustee of
SORENSEN RESEARCH AND DEVELOPMENT
TRUST, Plaintiff

/s/ Melody A. Kramer

Melody A. Kramer, Esq.
J. Michael Kaler, Esq.
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JENS ERIK SORENSEN, as Trustee of SORENSEN RESEARCH AND DEVELOPMENT TRUST,	
Plaintiff,	**Case No. 07cv02278BTM**
vs.	
HELEN OF TROY TEXAS CORPORATION; OXO INTERNATIONAL, LTD; and DOES 1-100,	
Defendants.	**San Diego, California**
	February 25, 2008

Status Conference

BEFORE THE HONORABLE BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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thing is if I grant them an extension of time to answer of 60 days, and I grant the stay without prejudice and they answer on behalf of Helen of Troy of Texas, and Oxo International, then I think everything is taken care of.

MR. VON ZEIPEL: That sounds good. 16:22:19

THE COURT: Mr. Kaler is about to speak.

MR. KALER: That would certainly be a resolution, not one I'm thrilled with. Has the court considered the possibility of a partial stay allowing some discovery, that does not address claim construction issues, to preserve 16:22:19 evidence in these cases that are newly filed?

THE COURT: I have not considered it, but that is certainly something that would be considered. No one should be prejudiced by the stay. It would be unfair to the plaintiff if there is a stay and something happens that they 16:22:19 lose evidence. So that's always an implied exception.

The stay is always granted without prejudice. If that wasn't understood then perhaps it's my fault in not making it clear.

MR. KALER: Would we need to bring a separate 16:22:20 motion?

THE COURT: First you would discuss it with the party you would want to take discovery on, and if they didn't agree, then you would then come before me.

MR. KALER: Okay. 16:22:20

THE COURT: And I think I would try to do it in a way that the parties would file something very, very brief so they don't take up a lot of attorney time and work, and then I would hear it orally and I would rule on it right there.

In other words, you would file something, maybe a page or two, saying we want to get an exception to the stay for the following reasons, we are going to come into court on such and such a date the clerk gives you, and we will flush them out, but here it is in capsule form. 16:22:20

MR. KALER: Thank you, your Honor. 16:22:21

THE COURT: All right? So that's when I say the stays are granted without prejudice. Well, does anyone have a problem if we proceed this way? I know it's not ultimately what you want, but you can't -- isn't there a song, You Can't Always Get What You Want? 16:22:21

MR. KALER: Your Honor, I was actually hoping for summary judgment in our favor this morning, but I'll take it.

THE COURT: Well, we will do an order in that regard. Is 60 days enough to file an answer?

MR. VON ZEIPEL: I believe so. 16:22:21

THE COURT: And the order will provide that you can file an amended answer 30 days after any re-examination decision.

MR. VON ZEIPEL: Thank you, your Honor.

THE COURT: All right? So, then that will take 16:22:21

Sorensen Research & Development Trust v. Emerson Electric, et al
Accused Products identified to Defendants as of June 9, 2008

Ridgid 18V Cordless Reciprocating Saw
Ridgid HD 3/8” VSR Drill
Ridgid HD Reciprocating Saw
Ridgid 18V Cordless ½” Hammer Drill
Ridgid 18V Cordless 1/2 “ Drill
Ridgid 18V Cordless Drill
Ridgid 14.4V Cordless ½” Drill
Ridgid 12V Right Angle Impact Driver
Ridgid 14.4V Impact Driver
Ridgid 12V Cordless 3/8” Drill
Ridgid Heavy Duty 3 Speed ½” Right Angle Drill
Ridgid Heavy Duty 2 Speed ½” VSR Drill
Ridgid Heavy Duty VSR Drywall Screwdriver
Ridgid Heavy Duty ½” VSR Hammer/Pulse Drill
Ridgid 7 ¼” Worm Drive Saw
Ridgid Heavy Duty 7 ¼” Circular Saw
Ridgid 18V Cordless Jig Saw
Ridgid Variable Speed Orbital Jig Saw
Ridgid Heavy Duty 11A Reciprocating Saw
Ridgid 18V Cordless Hand Planer
Ridgid Heavy Duty Variable Speed Belt Sander
Ridgid 9.6V Pivoting Screwdriver
Ridgid 9.6V Pivoting Screwdriver
Ridgid Heavy Duty ½” Two Speed Hammer Drill
Ridgid Heavy Duty VSR Drywall Screwdriver
Ridgid Professional 3/8” VSR Drill
Ridgid Heavy Duty ½” VSR Hammer Drill
Ridgid Max Select Dual Voltage Jig Saw
Ridgid Heavy Duty ½” VSR Drill
Ridgid 12 Volt Cordless 3/8” Drill
Ridgid Max Select Dual Voltage Reciprocating Saw
Ridgid 18 Volt Compact Lithium – Ion Drill
Ridgid Max Select Dual Voltage Circular Saw
Ridgid 24 Volt Lithium-Ion Cordless Hammer Drill
Ridgid Worklight
Ridgid ¼ Sheet Sander
Ridgid 5” Random Orbit Sander
Ridgid Max Select Hand Planer
Ridgid 6 ½” Compact Framing Saw
Ridgid 12 Volt Right Angle Impact Driver
Ridgid 7” Circular Saw
Ridgid 7 ¼” Worm Drive Circular Saw
Ridgid Variable Speed Orbital Jig Saw
Ridgid ½” Right Angle Drill
Ridgid Variable Speed Belt Sander
Ridgid Twist Handle Orbital Reciprocating Saw
Ridgid Heavy Duty 11Amp Reciprocating Saw
Ridgid 18 Volt Cordless Impact Driver
Ridgid 18 Volt Reciprocating Saw
Ridgid 18 Volt Circular Saw
Ridgid 18 Volt Cordless Hammer Drill